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4 UNITED STATES DISTRICT COURT
5 WESTERN DISTRICT OF WASHINGTON
6 AT SEATTLE

7 PAMELA BURKHARDT,

8 Plaintiff,

9 v.

10 SWEDISH HEALTH SERVICES, INC., a
11 Washington nonprofit corporation, dba
12 SWEDISH MEDICAL CENTER; and
13 SUSAN TERRY, individually and her
marital community,

14 Defendants.
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NO. 2:17-cv-00350-RSL

ORDER OF REMAND

17 THIS MATTER comes before the Court on “Plaintiff’s Motion for Order of
18 Remand and Award of Attorney’s Fees.” Dkt. # 10. Plaintiff alleges that she was
19 assaulted by her supervisor at work, that she was retaliated against when she reported
20 the assault, and that she was constructively discharged. Plaintiff asserts claims of
21 negligent infliction of emotional distress, breach of promise of specific treatment in
22 specific circumstances, breach of contract, and wrongful discharge in violation of
23 public policy. Plaintiff’s breach of promise and breach of contract claims are based on
24 unspecified “written and oral statements to plaintiff.” Dkt. # 1-2 at ¶ 5.2 and ¶ 6.2. In
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1 her motion for remand, plaintiff clarifies that these claims are not based on the terms
2 of the collective bargaining agreement (“CBA”), but rather on state law as it applies to
3 the employer’s policies and handbooks.
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5 Defendant Swedish Health Services, Inc., removed this matter to federal court
6 on the ground that plaintiff’s claims, and in particular the breach of promise and
7 breach of contract claims, are preempted by § 301 of the Labor Management Relations
8 Act, 29 U.S.C. § 185. Section 301(a) provides: “Suits for violation of contracts
9 between an employer and a labor organization representing employees . . . may be
10 brought in any district court of the United States having jurisdiction of the parties,
11 without respect to the amount in controversy or without regard to the citizenship of the
12 parties.” The section has been interpreted as a congressional mandate for the
13 application of federal common law to any dispute arising out of a labor contract. Allis-
14 Chalmers Corp. v. Lueck, 471 U.S. 202, 209 (1985). Although § 301 is arguably little
15 more than a venue provision, the United States Supreme Court concluded that “in
16 enacting § 301 Congress intended doctrines of federal labor law uniformly to prevail
17 over inconsistent local rules.” Teamsters v. Lucas Flour Co., 369 U.S. 95, 104 (1962).
18 The need for uniformity means that “if the resolution of a state-law claim depends
19 upon the meaning of a collective-bargaining agreement, the application of state law
20 (which might lead to inconsistent results since there could be as many state-law
21 principles as there are States) is pre-empted and federal labor-law principles –
22 necessarily uniform throughout the Nation – must be employed to resolve the dispute.”
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1 Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399, 405-06 (1988). See also Allis-
2 Chalmers, 471 U.S. at 210-11 (any claim that alleges a breach of a labor agreement or
3 that would require a determination regarding the meaning or scope of a term of a CBA
4 must be brought under § 301 and resolved pursuant to national labor policy). If,
5 however, plaintiff seeks to vindicate substantive rights in the labor context that do not
6 involve interpretation of a CBA, the claims are not preempted. Mere overlap in the
7 remedies available under the CBA and state law “does not make the existence or the
8 contours of the state law violation dependent upon the terms of the private contract . . .
9 In the typical case a state tribunal could resolve either a discriminatory or retaliatory
10 discharge claim without interpreting the ‘just cause’ language of a collective-
11 bargaining agreement.” Lingle, 486 U.S. at 412-13.

12 **A. BREACH OF PROMISE AND BREACH OF CONTRACT**

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14 The Court takes as true and binding plaintiff’s representation that her breach of
15 promise and breach of contract claims are not based on the CBA, but rather on
16 “Swedish’s promises set forth in its employee policies applicable to all employees,
17 union and non-union” Dkt. #10 at 15. See also Dkt. #10 at 20. Defendant
18 nevertheless argues that the claims necessarily require interpretation of the CBA,
19 relying on Swinford v. Russ Dunmire Oldsmobile, Inc., 82 Wn. App. 401 (1996). In
20 that case, the employer promised to give Swinford a leave of absence when he was
21 injured in a motorcycle accident as long as he reported to work by a certain date. The
22 agreement was memorialized in a letter and was based on a handbook issued by the
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1 employer. 82 Wn. App. at 405-06. When Swinford timely notified the employer that
2 he was ready to come back to work, the employer terminated his employment, stating
3 that it had found a better, more productive employee to take his place.
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5 Swinford's employment was generally governed by the terms of a CBA, but his
6 claim was based on an agreement and handbook that were separate from the CBA.
7 Nevertheless, the state court concluded that "we must rule against Swinford to protect
8 the rights of all union workers under CBAs. We refuse to set a precedent that allows
9 employers to disregard CBAs and enter into separate contracts with individual union
10 members." 82 Wn. App. at 407. This part of the state court's opinion is an assertion
11 that anyone covered by a CBA cannot, as a matter of federal labor policy, bring a state
12 law action on a separate, independent agreement with the employer because allowing
13 such agreements would dilute the power of collective action. This is simply not the
14 law. Section 301 "says nothing about the content or validity of individual employment
15 contracts." Caterpillar Inc. v. Williams, 482 U.S. 386, 394-95 (1987). Long before
16 Swinford was decided, the United States Supreme Court expressly found that "a
17 plaintiff covered by a collective-bargaining agreement is permitted to assert legal
18 rights *independent* of that agreement, including state-law contract rights, so long as the
19 contract relied upon is *not* a collective-bargaining agreement." Id. at 396 (emphasis in
20 original). The Washington Supreme Court has similarly held that "[t]he fact that an
21 employee is covered by a collective bargaining agreement does not always, as a matter
22 of law, bar the employee from bringing a claim of breach of promise of specific
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1 treatment in specific situations.” Korslund v. DynCorp Tri-Cities Servs., Inc., 156
2 Wn.2d 119, 184 (2005). To the extent Swinford can be read as invalidating or pre-
3 empting all contracts between an employer and an employee simply because the
4 employee is covered by a CBA, the Court rejects that analysis as inconsistent with
5 controlling law.
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7 The Swinford court goes on to analyze the terms of the CBA. After noting that
8 the CBA said it was “the full and complete Agreement between the parties hereto and
9 for all for whose benefit this Agreement is made,” the court concluded that that
10 provision would have to be interpreted in order to determine whether plaintiff’s
11 separate leave of absence agreement was enforceable. 82 Wn. App. at 411. Even if that
12 were a correct application of the law, defendant has not identified a similar provision
13 in its agreement with the union. Article 22.4 of the CBA, on which defendant relies,
14 states only that the union and the employer have reached an agreement and waive the
15 right to bargain collectively regarding matters not included in the CBA. Unlike the
16 provision in Swinford, the CBA in this case does not prohibit or waive agreements
17 between the employer and its individual employees.¹
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23 ¹ Defendant’s reliance on Jonassen v. Port of Seattle, 2014 WL 2611287 (W.D. Wash. June
24 10, 2014), is similarly misplaced. On appeal, the Ninth Circuit determined that § 301
25 preemption was not applicable because the defendant was a political subdivision. Jonassen v.
26 Port of Seattle, __ Fed. Appx. __, 2017 WL 1149116, at *1 (9th Cir. Mar. 28, 2017). The
breach of handbook claim was dismissed on the merits because Jonassen could not establish a
promise of specific treatment in specific situations.

1 More fundamentally, the fact that the Swinford court ultimately determined that
2 plaintiff's claim was preempted does not help defendant in this case. A defendant
3 might ultimately prove in the state court proceeding that a plaintiff's claim is
4 preempted under § 301, but that does not establish that it would necessarily be
5 removable to federal court. Caterpillar, 482 U.S. at 398. Removal jurisdiction arises
6 only if plaintiff could have asserted a federal claim based on the allegations of her
7 complaint. 28 U.S.C. § 1441. Unless federal law "both completely preempt[s] the state
8 law claim and supplant[s] it with a federal claim," preemption is merely a defense to
9 be raised in plaintiff's chosen forum. Young v. Anthony's Fish Grottos, 830 F.2d 993,
10 997 (9th Cir. 1987).

13 The question, then, is whether plaintiff's breach of promise and breach of
14 contract claims allege violations of the CBA, seek to enforce individual contracts that
15 are inconsistent with the CBA, or require a determination regarding the meaning or
16 scope of a term of a CBA. Allis-Chalmers, 471 U.S. at 210-11; Chmiel v. Beverly
17 Wilshire Hotel Co., 873 F.2d 1283, 1285 (9th Cir. 1989). Plaintiff is not asserting a
18 violation of the CBA, and defendant has not identified any inconsistency between the
19 alleged promises and the CBA. Defendant contends that consideration of plaintiff's
20 policy and handbook claims will require a determination regarding the meaning or
21 scope of the CBA, but the basis for that contention is unclear. Defendant lists a
22 number of provisions in the CBA that touch on safety and health issues (Article 17.4),
23 discipline (Article 6.3), and applying for and notifying managers of intra-campus
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1 transfers (Articles 6.9 and 6.10). Defendant also quotes at length the “Management
2 Rights” provision of the CBA, which grants the employer the right to impose standards
3 of performance and maintain order and efficiency in the workplace. Dkt. #15.
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5 Plaintiff’s breach claims will turn on proof of an enforceable promise – independent of
6 the CBA – and its breach. The terms and nature of the promise/contract do not depend
7 on any provision of the CBA: whether an enforceable contract exists and the
8 appropriate remedies will be determined with reference to state law principles. Nor
9 does defendant plausibly assert that the breach of promise or breach of contract claims
10 are inconsistent with the management rights provision or the provision mandating a
11 “safe and healthful work place in compliance with Federal, State and local laws
12 applicable to the safety and health of its employees.”² Even if defendant intends to
13 refer to these provisions as justification for the conduct alleged by plaintiff, there is
14 simply no risk that the state court would interpret them in a way that could threaten the
15 uniformity of national labor law. Arguments regarding the legality or enforceability of
16 the individual employment contract, exclusive representation principles of the NLRA,
17 and/or the existence of unfair labor practices can and should be raised in state court as
18 a defense to the claim. Caterpillar, 482 U.S. at 397-98.
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23 ² The independence of plaintiff’s contract claim is not destroyed simply because the CBA
24 incorporates by reference existing federal, state, and local health and safety laws. The
25 incorporation does not require the interpretation of the CBA as much as the underlying laws.
26 Paige v. Henry J. Kaiser Co., 826 F.2d 857, 863 (9th Cir. 1987). The Ninth Circuit has
determined that “allowing an employer to avoid the effects of state laws by this type of
incorporation would subvert congressional intent for the NLRA to coexist with state laws
which set labor standards.” Id. (citing Metro, Life Ins. Co. v. Mass., 471 U.S.724, 756 (1985)).

1 It is true that when a defense to a state claim is based on the terms of a
2 collective-bargaining agreement, the state court will have to interpret
3 that agreement to decide whether the state claim survives. But the
4 presence of a federal question, even a § 301 question, in a defensive
5 argument does not overcome the paramount policies embodied in the
6 well-pleaded complaint rule – that the plaintiff is the master of the
complaint, that a federal question must appear on the face of the
complaint, and that the plaintiff may, by eschewing claims based on
federal law, choose to have the cause heard in state court.

7 Caterpillar, 482 U.S. at 398-99. Plaintiff’s breach of promise and breach of contract
8 claims do not require interpretation of the CBA. At most, the state court may have to
9 refer to or consider the CBA, but that is not enough to trigger complete preemption.
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11 Kobold v. Good Samaritan Reg’l Med. Ctr., 832 F.3d 1024, 1033 (9th Cir. 2016).

12 **B. NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS**

13 Plaintiff’s claim of negligent infliction of emotional distress is based on duties
14 arising solely out of state law. Defendant Terry is alleged to have physically assaulted
15 plaintiff, and defendant Swedish is accused of mishandling her complaint, retaliating,
16 and constructively discharging plaintiff in violation of public policy. Evaluating the
17 source of the duties and the facts related to breach will not require reference to, much
18 less interpretation of, the CBA. Even if plaintiff, as a member of the bargaining unit,
19 had substantial rights under the CBA and could have brought suit under § 301, she
20 remains master of her complaint and chose not to do so. Caterpillar, 482 U.S. at 395.
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23 Unlike the situation in Stallcop v. Kaiser Found. Hosps., 820 F.2d 1044, 1049
24 (9th Cir. 1987), plaintiff’s claim does not arise from the application of the disciplinary
25 processes set forth in the CBA. This case is more like Tellez v. Pac. Gas & Elec., 817
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1 F.2d 536 (9th Cir. 1987), in which a manager distributed an allegedly defamatory letter
2 within the workplace accusing plaintiff of buying cocaine and suspending him without
3 pay for ten days. The court found that the defamation claim “neither asserts rights
4 deriving from the collective bargaining agreement, nor requires interpretation of the
5 agreement’s terms.” Id. at 538. Given the nature of plaintiff’s emotional distress claim
6 and the allegations of the complaint, there is no dispute regarding the meaning of the
7 CBA. In such circumstances, “the fact that a CBA will be consulted in the course of
8 state law litigation does not require preemption.” Ward v. Circus Circus Casinos, Inc.,
9 473 F.3d 994, 998 (9th Cir. 2007).

12 **C. WRONGFUL DISCHARGE IN VIOLATION OF PUBLIC POLICY**


13 Plaintiff alleges that defendants breached Washington’s public policies
14 shielding employees from workplace violence, harassment, and retaliation. “Section
15 301 does not preempt every public policy claim brought by an employee covered by a
16 collective bargaining agreement. Thus, a claim is not preempted if it poses no
17 significant threat to the collective bargaining process and furthers a state interest in
18 protecting the public transcending the employment relationship.” Young, 830 F.2d at
19 1001. The policies on which plaintiff relies benefit employees “as individual workers,
20 not because they are or are not members of a collective bargaining association.” Paige,
21 826 F.2d at 863. Because the resolution of plaintiff’s wrongful discharge claim
22 depends upon an analysis of state public policy and defendants’ conduct, it is not
23 intertwined or substantially dependent on the CBA and is not preempted by § 301.
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1 For all of the foregoing reasons, plaintiff's motion for remand is GRANTED.
2 Plaintiff's claims do not arise out of the CBA and will not require more than a passing
3 reference to its terms. Plaintiff alleges that her supervisor assaulted her and that, when
4 she reported the assault, she was harassed and retaliated against in violation of state
5 tort law and promises made by the employer that were independent of the CBA. If
6 these facts are proven, plaintiff will have established the elements of her various
7 causes of action without reference to the CBA. If defendants have a collectively-
8 bargained defense, it may be asserted in state court. Plaintiff's claims, as clarified in
9 her motion, could not have been originally filed in federal court and are not subject to
10 removal under § 301.
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13 Plaintiff's request for an award of fees is DENIED. Her breach of contract
14 claim was stated in such a way that it was not clear at the time of removal whether it
15 was based in part on the CBA. Given that ambiguity, removal was not unreasonable.
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17 Martin v. Franklin Capital Corp., 546 U.S. 132, 141 (2005).
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19 Dated this 16th day of May, 2017.
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22 ROBERT S. LASNIK
23 United States District Judge
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